

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD L. REBMAN and YOUNG
REBMAN, husband and wife,

NO. CV-04-5064-EFS

Plaintiffs,

v.

**ORDER RULING ON POST-TRIAL
MOTIONS AND GRANTING A NEW
TRIAL ON THE ISSUE OF NON-
ECONOMIC DAMAGES ONLY**

JOHNATHAN R. PERRY, M.D.; and
KADLEC MEDICAL CENTER, a
Washington corporation,

Defendants.

A hearing was held in the above-captioned matter on December 18, 2006. Richard Eymann and Richard Rogers appeared on behalf of Plaintiffs; Plaintiff Donald Rebman was present. David Thorner appeared on behalf of Defendant Johnathan R. Perry, and Jerry Aiken represented Defendant Kadlec Medical Center ("KMC"). Before the Court were Plaintiffs' Motion to Amend or Alter Judgment or, in the Alternative, for Judgment as a Matter of Law Concerning Past Medical Expenses (Ct. Rec. 252), Defendant Perry's Motion for New Trial (Ct. Rec. 258), and Plaintiffs' Motion for New Trial on the Issue of Damages Only (Ct. Rec. 267). After reviewing the submitted materials and relevant legal authority in light of the Court's prior rulings and trial testimony, the Court is fully informed; the Court grants a new trial on the issue of non-economic damages and denies the other relief requested.

1 **A. Motions for New Trial**

2 Defendant Perry asks the Court to order an entirely new trial due
3 to issues relating to Pamela Dempewolf and Dr. Chau; while Plaintiffs ask
4 the Court to order a new trial on the issue of damages only. Federal
5 Rule of Civil Procedure 59(a) provides:

6 A new trial may be granted to all or any of the parties and on
7 all or part of the issues (1) in an action in which there has
8 been a trial by jury, for any of the reasons for which new
trials have heretofore been granted in actions at law in the
courts of the United States;

9 *See also* FED. R. CIV. P. 60(b). The Court is familiar with the trial
10 testimony and the events that unfolded during the course of trial
11 relating to Pamela Dempewolf, KMC's response to Interrogatory No. 9, and
12 comments made by counsel relating to information precluded by motion in
13 limine rulings; the Court will not repeat these here.

14 The Court does not find anything during the course of trial or in
15 the jury verdict that requires a need for a new trial due to the
16 materially misleading Interrogatory Response No. 9; there is nothing in
17 this response when compared to the nurses' notes and hospital chart and
18 trial testimony by Nurse Dempewolf that could have affected Dr. Perry's
19 trial preparation or trial arguments.

20 Dr. Chau's participation in the care of Mr. Rebman is in the chart
21 which was available to all of the parties to the case from the very
22 beginning yet he was not added as a defendant nor was any expert critical
23 of the care that he gave to Mr. Rebman. Accordingly, the sanction for the
24 materially misleading answer was that Nurse Dempewolf's testimony was
25 stricken regarding any conversation she had with Dr. Chau as it was
26 materially different from what she initially told Mr. Aiken and there is

1 no evidence that she ever recanted. At trial, her testimony was
2 materially different from that interview. Defendant KMC should not
3 benefit from providing a materially misleading answer.

4 Each Defendant could have asserted negligence on the part of Dr.
5 Chau as an affirmative defense and at trial asked for the jury to
6 allocate fault to a non-party as permitted by Washington law. RCW
7 4.22.070 provides, "[t]he entities whose fault shall be determined
8 include the claimant or person suffering personal injury or incurring
9 property damage, defendants, third-party defendants, entities released
10 by the claimant, entities immune from liability to the claimant. . . ."
11 Yet, neither the Defendants nor the Plaintiffs and their respective
12 experts pointed to Dr. Chau's care of Mr. Rebman as a cause of his
13 injuries.

14 Additionally, the Court finds unpersuasive Dr. Perry's insistence
15 that it was error to fail to strike the testimony of Nurse Dempewolf
16 because of the following questions by Mr. Rogers and answers by Nurse
17 Dempewolf:

18 Q. [D]id you share with Dr. Perry what you told this jury Dr. Chau had
19 just told you 30 minutes earlier?

20 A. Yes.

21 Q. So when Dr. Perry came in at 5:30 on June 6th, you told him what Dr.
22 Chau told you ?

23 A. No.

24 Q. You didn't?

25 A. No. I misunderstood your question.
26

1 Q. So just so we all have this really clear, ...Dr. Perry comes in 30
2 minutes later to check on his patient, and you don't tell Dr. Perry
3 of the conversation you just had 30 minutes ago with Dr. Chau... Do
4 we have that right?

5 A. That's right.

6 (Ct. Recs. 268 at 6, 328 at 3). There is nothing in that exchange that
7 required a curative instruction. Any juror would understand that Nurse
8 Dempewolf did not tell Dr. Perry about the conversation she had with Dr.
9 Chau. Accordingly, there was no prejudice to Dr. Perry from these
10 questions and answers and a new trial on this basis alone or considered
11 together with Dr. Perry's argument about KMC's response to Interrogatory
12 9, stricken by the Court, that justifies a new trial on all issues. In
13 addition, the Court does not find the interrogatory response affected
14 Plaintiffs' trial preparation or strategy; Plaintiffs' trial strategy
15 from the beginning was that Dr. Perry engaged in malpractice by not
16 performing an arteriogram to determine if the blood flow to the popliteal
17 artery was affected.

18 Accordingly, after considering the parties' trial strategies, the
19 testimony presented, the Court's rulings, and the jury verdict, the Court
20 concludes the verdict imposing liability against Defendants and
21 apportioning fault is not contrary to the clear weight of the evidence
22 and does not result in a miscarriage of justice. See *City Solutions,*
23 *Inc. v. Clear Channel Comms.*, 365 F.3d 835, 843 (9th Cir. 2004); *Lincoln*
24 *Carpet Mills, Inc. v. Singer Co.*, 549 F.2d 80, 82-83 (8th Cir. 1977).
25 The verdict evinces the jury was able to distinguish between Dr. Perry
26 and the nurses' respective conduct and to listen to and apply the

1 causation opinions of the parties' experts. Given the jury's ability to
2 weigh this evidence, the allocation of liability is best left to the
3 jury.

4 To set aside a jury verdict, the Court must utilize its independent
5 judgment after examining all of the evidence to determine whether the
6 jury's verdict in whole or in part was against the clear weight of the
7 evidence. *Lincoln Carpet Mills v. Singer Co.*, 549 F.2d 80 (8th Cir.1977).
8 The Court when sitting on a diversity case, as here, must consider state
9 law in determining the issue of the inadequacy of the jury verdict.
10 *Gasperini v. Center for the Humanities, Inc.*, 518 U.S. 415, 437 (1966).
11 Jury verdicts are entitled to respect, particularly awards of non-
12 economic damages. Such verdicts should not be overturned until and unless
13 the Court is convinced that the verdict was the result of passion and
14 prejudice. *RWR Management, Inc. v. Citizens Realty Co.* 133 Wn. App. 265
15 (Div. III, 2006). Whether the applicable standard is "shocks the
16 conscience of the court" or amounts to "manifest injustice" *Gasperini*,
17 518 U.S. at 429,430 as in the federal system or whether it is that the
18 verdict was the result of "passion and prejudice", it is met in this
19 case.

20 Here a Korean-born wife of Mr. Rebman, Young Rebman, sat with her
21 back to the jury and her head down throughout the trial. When testifying,
22 she spoke with an accent and rarely if ever looked at the jury though her
23 testimony was a poignant description of the myriad consequences to she
24 and her husband and their marriage as a result of the amputation of his
25 leg above the knee. An award of \$0 is not within the range of the
26 evidence. Her emotional damages, loss of consortium, if you will, was not

1 contested by any other witness called by either Defendant. The Court can
2 only conclude that on the evidence in this case the jury verdict of \$0
3 non-economic damages to Young Rebman was the product of passion and
4 prejudice and is a manifest injustice.

5 As to Mr. Rebman, he no longer has a leg below mid thigh. He has a
6 thirty-four year life expectancy. The testimony about his limitations and
7 his difficulty in adjusting to the loss of his leg was graphic and
8 disturbing as was his demonstration of the condition of his stump and the
9 problems he has had and will have for the rest of his life. No reasonable
10 juror unaffected by passion or prejudice could award him only \$100,000.00
11 for the loss of his leg with all of its consequences. This was the
12 Court's immediate reaction to the jury verdict when it was read and the
13 reason why it declined to discuss damages with the jurors. On the
14 testimony in this case, it is the Court's duty to grant a new trial
15 limited to the issue of non-economic damages.

16 The Court concludes the non-economic damage findings are clearly
17 against the weight of the evidence and are the result of passion and
18 prejudice. See *Conrad v. Alderwood Manor*, 119 Wash. App. 275, 293
19 (2003). The Court finds the jury's \$100,000 non-economic damages award
20 for Mr. Rebman and \$0 loss of consortium award inexplicable in the face
21 of the trial testimony on these damages. The trial testimony should have
22 persuaded any reasonable jury, but for one afflicted with passion and
23 prejudice, that Mr. Rebman's non-economic damages were worth more than
24 \$100,000. In addition, the Court recognizes that not every injury
25 creates a loss of consortium claim; however, this is a type of injury
26 that does.

1 For these reasons, the Court **denies** Dr. Perry's motion and **grants**
2 **in part** Plaintiff's motion, ordering a new trial on the issue of non-
3 economic damages only.

4 **B. Past Medical Expenses**

5 Plaintiffs ask the Court to amend the jury verdict to award Mr.
6 Rebman past medical expenses of \$109,696.81. Plaintiffs submit the
7 parties reached a verbal stipulation that Mr. Rebman's past medical
8 expenses associated with the amputation were \$109,696.81. Plaintiffs
9 argue that the jury mistakenly returned a verdict that gave \$0 for past
10 medical expenses given that the \$504,000 economic damage award matched
11 the testimony by defense expert Daniel Harper for loss of past and future
12 income and future life care costs and services. Defendant Perry concurs
13 with Plaintiff that the jury failed to acknowledge that Mr. Harper's
14 opinion did not include past medical expenses and agrees the Court should
15 increase the economic damage award by \$109,696.81. Defendant KMC does
16 not so agree. Defendant Kadlec contends it reached an agreement that
17 past medical expenses in the amount of \$109,696.81 were reasonable, but
18 submits it did not agree that such expenses were necessarily proximately
19 caused by Defendants' conduct.

20 Although the Court concludes the parties reached a stipulated
21 agreement that Mr. Rebman's past medical expenses in the amount of
22 \$109,696.81 were reasonable, the Court cannot adjust the economic damages
23 award. Because Plaintiffs and Dr. Perry were unable to point to a
24 specific agreement either in writing or during the course of trial
25 relating to past medical expenses, the Court cannot conclude for certain
26 that the jury's \$504,000 economic damage award did not include an amount

1 for past medical expenses. Therefore, the Court concludes that granting
2 Plaintiffs' request would constitute impermissible additur. *See Lariano*
3 *v. Hobert Corp.*, 170 F.3d 264, 272 (2d Cir. 1999).

4 For the reasons given above, **IT IS HEREBY ORDERED:**

5 1. Plaintiffs' Motion to Amend or Alter Judgment or, in the
6 Alternative, for Judgment as a Matter of Law Concerning Past Medical
7 Expenses (**Ct. Rec. 252**) is **DENIED**.

8 2. Defendant Perry's Motion for New Trial (**Ct. Rec. 258**) is
9 **DENIED**.

10 3. Plaintiffs' Motion for New Trial on the Issue of Damages Only
11 (**Ct. Rec. 267**) is **GRANTED IN PART (non-economic damages only)**.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this Order and provide copies to counsel.

14 **DATED** this 25th day of January 2007.

15
16 s/ Edward F. Shea
EDWARD F. SHEA
17 United States District Judge

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